THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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Association Activities

VERNON G. SETSER, Chief, Commercial Treaties Bureau, Department of State, was a guest at the January meeting of the Committee on Foreign Law, James G. Johnson, Jr., Chairman. At this meeting, following an informal discussion with Mr. Setser, the Committee considered such matters as an exchange program of American lawyers and lawyers of the Soviet Union, and a proposed study of legal problems in the new African states.

The Committee in February sponsored a successful symposium on "Legal Problems of the European Common Market." Speakers were Michel Gaudet, Director, Service Juridique, The Commission-European Economic Community; Emile Benoit, Professor of International Economics, Columbia School of Business Administration; Walter Herzfeld, J.D. (Germany), LL.M. (France), Member, New York Bar; and William T. Ketcham, Jr., General Counsel, IBM World Trade Corporation.

JOHN R. STEVENSON, Chairman of the Committee on International Law, represented the Association at hearings before the Senate Foreign Relations Committee on the withdrawal of the self-judging aspect of the United States' domestic jurisdiction reser-

vation with respect to the International Court of Justice. The Committee had as its guests Constantin A. Stavropoulos and Michael Bradfield of the United Nations Legal Department. The Committee discussed with its guests the work of the International Law Commission, its procedure and organization, the organization and work of the Legal Counsel's staff and their opinions. At the invitation of Mr. Stavropoulos, the Committee had lunch at the United Nations on February 2 to talk with members of the Counsel's staff.

THE EXECUTIVE Committee has authorized the creation of several new special committees. The following are Subcommittees of the Executive Committee: Subcommittee on Program, Orison S. Marden, Chairman; Subcommittee on Additional Judges, Lyman M. Tondel, Jr., Chairman; Subcommittee on Review of Grievance Committee Procedure, James H. Halpin, Chairman; and Subcommittee on Increase of Association Revenues, W. Mason Smith, Jr., Chairman. The following are special committees of the Association: Public Lectures, A. Fairfield Dana, Chairman; and Centennial, Allen T. Klots, Chairman. A joint committee to extend hospitality to visiting judges has also been appointed. This is a joint committee with the New York County Lawyers' Association. The members on this committee from this Association are Arnold Bauman, Albert R. Connelly, Walter R. Mansfield, Leland L. Tolman and Paul W. Williams.

THE SPECIAL Committee on Family Law, Jacob L. Isaacs, Chairman, was represented by its Chairman at hearings in Albany on legislation introduced by the Joint Legislative Committee on Matrimonial and Family Laws.

THE INTERNAL Revenue Service has asked that attention be directed to new requirements relating to extensions of time for filing individual income tax returns. These requirements are contained in Treasury Decision 6436 and are effective for taxable

years beginning after December 31, 1958. Thereafter, every individual requesting an extension of time for filing his income tax return will be required to furnish *all* of the following information:

1. Why he needs more time.
2. For how long.
3. Whether he filed and made timely payments on any required Declaration of Estimated Tax for the year (new requirement).
4. Whether each of his returns for the last three years was filed on time or within an approved extension (new requirement).

Although a new form (Form 2688) for requesting extensions on individual income tax will be available at internal revenue offices, letters or other informal written applications for extensions will continue to be acceptable provided they contain the necessary information and are signed by the taxpayer or his duly authorized representative. Applications for extensions of time for corporations will continue to be made on Form 7004 as in the past.

THE NINETEENTH Annual Benjamin N. Cardozo Lecture was delivered by The Honorable Bernard Botein. Justice Botein's topic was "The Future of the Judicial Process: Challenge and Response." The lecture will be published in the April number of THE RECORD.

JUDGE ARCHIE O. DAWSON was the guest of the Committee on Admiralty, W. Mahlon Dickerson, Chairman, at its January meeting. At that meeting consideration was given to the suggested amendments to the Rules of the Road.

THE COMMITTEE on Entertainment, Eugene A. Leiman, Chairman, has announced that the President's Ball will be held this

year on May 13. Ben Cutler's orchestra will again furnish the music. Alan U. Schwartz is Chairman of the Subcommittee in charge of the Ball.

THE SECTION on Taxation, David E. Watts, Chairman, sponsored a panel discussion on "Non-Restricted Stock Options—Compensation or Capital Gain?" Speakers were John F. Costelloe, Henry W. de Kosmian and Robert J. McDonald.

THE NEW YORK Employing Printers Association selected for hanging in the 18th Exhibition of Printing the Association's 1959 Memorial Book and issues of THE RECORD. Selection indicates that these pieces were "picked by an eminent Board of Judges as outstanding in their own category from among the thousands of entries submitted for consideration." Both THE RECORD and the Memorial Book have won similar awards in previous years.

THE SPECIAL Committee on the Federal Conflict of Interest Laws released its Report on February 22. The Report was the culmination of a two-year study, sponsored by the Ford Foundation.

The Committee reported that "the legal and administrative machinery of the Federal Government for dealing with the problem of conflicts of interest is obsolete, inadequate for the protection of the Government, and a detriment to the recruitment and retention of executive talent and some kinds of needed consultative talent."

The Report included a model Act which has been introduced in both Houses of Congress. The members of the committee were:

Roswell B. Perkins, *Chairman*
Howard F. Burns
Charles A. Coolidge
Paul M. Herzog
Alexander C. Hoagland, Jr.
Everett L. Hollis
Charles A. Horsky
John V. Lindsay
John E. Lockwood
Samuel I. Rosenman

The Committee Staff included Professor Bayless Manning of the Yale Law School, Staff Director, and Professor Marver H. Bernstein of the Department of Politics of Princeton University, Associate Staff Director.

A summary of the Report will be printed in THE RECORD for next month. The Harvard University Press will publish the full Report next fall.

The Calendar of the Association for March and April

(as of February 29, 1960)

March 1 Meeting of Committee on State Legislation
Dinner Meeting of Executive Committee

March 2 *Special Stated Meeting of the Association,* 8:00 P.M.
Dinner Meeting of Committee on Real Property Law

March 3 Dinner Meeting of Committee on Criminal Courts, Law and Procedure
Meeting of Section on Wills, Trusts and Estates
Meeting of Joint Medical-Legal Committee

March 7 Dinner Meeting of Committee on Professional Ethics
Meeting of Committee on Entertainment

March 8 *Stated Meeting of the Association,* 5:00 P.M. *Buffet Supper,* 7:15 P.M. *Forum,* 8:00 P.M.
Meeting of Committee on State Legislation

March 9 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on the Bill of Rights
Dinner Meeting of Committee on Municipal Affairs

March 10 Dinner Meeting of Committee on Criminal Courts, Law and Procedure

March 14 Dinner Meeting of Committee on Family Law

March 15 Dinner Meeting of Committee on Courts of Superior Jurisdiction
Meeting of Committee on State Legislation
Meeting of Committee on Arbitration
Dinner Meeting of Special Committee on Banking
Dinner Meeting of Committee on Insurance Law
Dinner Meeting of Committee on Administrative Law

March 16 Meeting of Committee on Admissions
Dinner Meeting of Committee on Trade Marks and Unfair Competition
Dinner Meeting of Committee on Foreign Law
Meeting of Section on Banking, Corporation and Business Law

March 21 Meeting of Library Committee
Dinner Meeting of Committee on Medical Jurisprudence
Dinner Meeting of Committee on Criminal Courts, Law and Procedure

March 22 Meeting of Committee on State Legislation
Meeting of Committee on Domestic Relations Court
Dinner Meeting of Committee on Copyright
Dinner Meeting of Committee on Atomic Energy

March 23 Meeting of Section on Trade Regulation
Dinner Meeting of Committee on Trade Regulation
Dinner Meeting of Committee on International Law

March 24 *Space Forum:* Sponsorship Committee on Aeronautics

March 29 Meeting of Committee on State Legislation

March 30 Dinner Meeting of Committee on Legal Aid

March 31 Dinner Meeting of Committee on Criminal Courts, Law and Procedure

April 4 Dinner Meeting of Committee on Professional Ethics
Meeting of Committee on Family Law

April 5 Meeting of Committee on State Legislation
Dinner Meeting of Committee on Insurance Law

April 6 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

April 7 Dinner Meeting of Committee on the Bill of Rights

April 12 Meeting of Committee on State Legislation

April 18 Meeting of Library Committee

April 19 Dinner Meeting of Committee on Administrative Law

April 20 Meeting of Committee on Admissions
Dinner Meeting of Committee on Trade Marks and Unfair Competition
Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Foreign Law

April 21 Dinner Meeting of Committee on Courts of Superior Jurisdiction
Meeting of Committee on Arbitration
Dinner Meeting of Committee on Municipal Affairs

April 26 Dinner Meeting of Committee on Aeronautics
15th Annual Art Exhibition—Opens 4:30 P.M.

April 27 Dinner Meeting of Committee on Domestic Relations Court
Dinner Meeting of Committee on Copyright
Dinner Meeting of Committee on International Law

April 28 Meeting of Section on Banking, Corporation and Business Law

The President's Letter

To the Members of the Association:

The administration of justice is furthered whenever a judge who has served with distinction is elevated to another court. This occurred when Mayor Wagner appointed Chief Magistrate Murtagh as Chief Justice of the Court of Special Sessions. We wish Chief Justice Murtagh every success in this important post.

The Special Committee on the Conflict of Interest Statutes announced on February 19 the completion of its study of the conflict of interest statutes. This study, described elsewhere in THE RECORD, is a notable contribution to good government. The distinguished Chairman of the Committee, Mr. Roswell B. Perkins, as well as the members of his Committee, are to be congratulated on an important job well done. Credit also is due to Professor Bayless A. Manning of the Yale Law School, who served as Research Director for the study.

I am also happy to announce that due to foundation grants we can now undertake studies in two fields in which the Association has long been interested. One is a study of the problems, both human and legal, connected with the commitment of the mentally incompetent. This study is undertaken upon the recommendation of Presiding Justice Bernard Botein and Dr. Paul H. Hoch, the Commissioner of Mental Hygiene. It will be directed by a Special Committee under the Chairmanship of former President Allen T. Klots. The other members of the Committee will be announced at an early date. The Association will collaborate with the Law School of Cornell University and the Department of Mental Hygiene. The Director of Research will be Professor Bertram F. Willcox, the McRoberts Research Professor in Administration of the Law, Cornell University, who is well known to many of our members. The study is made possible through generous grants from The Commonwealth Fund, The New-Land Foundation, Inc. and by grants-in-aid from Cornell University.

The Ottinger Foundation and The Aaron E. Norman Fund

have made grants which will enable us to review the system of bail as it is now used in our criminal courts. We hope this review will result in constructive measures to correct abuses which have been called to our attention.

Meanwhile, as announced in this issue of THE RECORD, several Special Committees have been appointed and are now engaged in interesting work. One of the hardest working of these is the Subcommittee on Program of the Executive Committee. It has made a number of imaginative and practical proposals. As a result a Special Committee of the Association is planning public lectures on the law for laymen, under the auspices of the Association.

Another interesting project which we are undertaking is the preparation for the Centennial of the Association which, although it will not take place until 1970, requires long-range planning. One of the suggestions which the Committee is considering is the publication of a history of the Association by a distinguished scholar.

Another subcommittee of the Executive Committee is reviewing additional sources of revenue which may be made available to the Association in future years.

I have elsewhere reported on the excellent work of a special committee charged with the responsibility of trying to secure additional judgeships in the Southern District of New York. We have reason to hope that this effort will be successful.

The Executive Committee has also authorized a study by a subcommittee of present Grievance Committee procedures. These procedures have not been reviewed for many years. Both the Grievance Committee and its new counsel welcome this study undertaken by members of the Executive Committee who are familiar with the work of the Grievance Committee.

I want again to express my appreciation and that of the membership to Presiding Justice Bernard Botein for the scholarly and stimulating Cardozo Lecture which he delivered before a large audience on February 25.

As many of you are aware, the United States Court of Appeals has held that the Cromwell legacies to our Association, the New

York State Bar Association and the New York County Lawyers' Association are not subject to estate tax. This will greatly enhance the value of these legacies. Great credit is due to Whitney North Seymour, who argued for the Bar Associations and to Mr. D. Nelson Adams, who acted as counsel for our Association, and to them our very real thanks for their signal contribution to the welfare of the Association.

DUDLEY B. BONSAL

February 25, 1960

The Independence of the Legal Profession

By DUDLEY B. BONSAL

It is a great privilege for me to speak to you today. I realize, however, that you have heard many speeches—capped by the distinguished address of John Randall, the President of the American Bar Association. Besides listening to speeches, many of you have attended Section and Committee meetings, and you have more to come. Also, I am sure that many of you are looking forward with impatience to the conclusion of my remarks so that you can partake of the refreshments and conviviality which it will be my pleasure to invite you to participate in. Therefore, my remarks will not take the form of an address, but rather, some thoughts that have occurred to me and which I hope may strike some responsive spark with you.

My theme today is the independence of the legal profession. Ever since Chief Justice Coke declared, in the beginning of the seventeenth century, that the law was supreme, even over the king, it has been essential that the legal profession stand on its own feet, independent of the king and his successors, and independent of any particular economic or political group. This is a concept which we have always held sacred. It is a concept which is the cornerstone of our common law heritage. It is basic to our ideal of a Rule of Law in our country just as it must be basic to any concept of an international Rule of Law.

There are a number of danger signals which I suggest to you are working against the independence of our profession. Some of you may have noticed, for instance, that the independence of the British Bar is presently being challenged by the economic condition of the profession. The London *Economist* published an article earlier this month entitled "How to Rescue the Bar?", in which it described the shocking shrinkage of the Bar of England. It is there stated that fewer than 2,000 men and only 80

Editor's Note: Published here are the remarks made by the President of the Association at the Annual Meeting of the New York State Bar Association on January 29, 1960.

women are practicing barristers in England, and that in the year 1957–58 only 91 barristers started practice, while 112 left the Bar. The rate of attrition, it is said, is steadily increasing. Our British brethren are greatly alarmed by these facts and are seeking ways to stop the disintegration of their profession.

We in this country are also facing a number of challenges to the independence of our profession. Judge Conway, in speaking to a group of lawyers the other day, remarked that the eyes of the public are not on the Bar today as they were 25 or 50 years ago. We no longer enjoy the same position of leadership that we once enjoyed, due in part to the fantastic scientific progress which has been made in our lifetime. The public look to the scientist, where they used to look to the lawyer. The thoughts of men concentrate on the whole scientific range from the marvels of space to the gadgets of the household.

The lawyer, too, cannot remain unaffected by the scientific developments which are taking place around him. Yet these changes in no way diminish the importance of the role which he should play in society. On the contrary, his responsibility increases. He must have the vision and the courage to see to it that our legal system continues to meet the needs of mankind and that man continues to live under the Rule of Law.

Professor Kenneth S. Carlston of the University of Illinois Law School put it admirably in a recent article in the Northwestern University Law Review when he said:

> "It is the lawyer's fate, no less than that of any man, to search continually for the truth. For if, in the words of Plato, law is 'the leading string, golden and holy,' which binds a society together, then the pattern of its golden skeins reveals the structure of the society itself. As it is the scientist's faith that there is an ultimate symmetry, order and truth in nature, so it is the lawyer's faith that the body of law will express the full image of the society which it unites."

Walter Lippmann recently wrote an article on "A Satisfied Nation." He queried the view that, because our country is pros-

perous, it must also be deemed secure, or that we will necessarily win the international competition because we are dedicated to individual liberty. Mr. Lippmann also challenged the thesis that we can concentrate our energies in our private affairs, confident that our national interests are secure. I wonder whether we, as lawyers, may not be going through a similar period of self-satisfaction and complacency. Are we in a position to concentrate on our practices, secure in the thought that the independence of our profession will be maintained?

We live in an era of big government, big business and big labor. We live under a highly complicated economic system with growing government encroachment. The demands of the day call for an ever higher degree in specialization, and our profession has not escaped the consequences. Our lawyers tend to become, more and more, specialists in one field or another. They may call themselves trial lawyers, or tax lawyers, or negligence lawyers, or corporation lawyers, or international lawyers, or government lawyers, or house counsel. Many of them, because of the nature of their practice, have little contact with the organized Bar. This specialization has led to the proliferation of lawyers' groups of all kinds, each serving a relatively small part of the lawyer's spectrum. Necessary as many of them are, they inevitably divert the lawyer's interest from his basic responsibility to his profession.

Also, in our fast moving system, a lawyer's life becomes, more and more, one of deadlines. We have deadlines imposed on us by our clients, and it is our duty to meet them promptly and adequately. We have the deadlines imposed by the innumerable political and charitable causes in which lawyers play such an important part. But there are other deadlines presented by the needs of our profession, and these too must be met if our independence is to be maintained.

We have been brought up in the tradition of the common law, so that we tend to place great reliance on what has been done before. This is as it should be, providing we distinguish between truth and what has been called conventional wisdom. Too often we are apt to believe that something is true merely because it is

conventional and, hence, convenient for us to do so. This, too, may open the way to complacency in our professional lives. We accept as cardinal principles the duty of a lawyer to defend unpopular causes and to protect the constitutional rights of our citizens from every attack. But our ability to do this will continue only so long as we, by our efforts, sustain the freedom of our profession. This freedom cannot be sustained by complacency or self-satisfaction. It requires on the part of every one of us, a search for the truth, energy of mind, determined resistance against inertia of mind and spirit, and a conscious effort not to be misled by conventional wisdom.

The threats to our independence must be resolutely met, because there has never been a time in history when we have had a greater responsibility to our community and to our country, or more opportunities to serve the Administration of Justice.

Take our own State of New York. How about Court Reorganization? This century has not seen a major reorganization of our courts, but at least an important step forward was taken last year by the Legislature. While this may not be the optimum in court reorganization, it is a great step forward, and the Bar, which has had much to do in bringing it about, now has the responsibility in seeing that the principles of court reorganization become embodied in the Constitution of our State.

How about the Selection of Judges? We have had some great judges in our State and we have some now, but the profession must be constantly concerned with ways and means of improving the standards and quality of our judiciary. The 50 States of our country employ seven different methods for selecting judges for their major courts. Are we sure that ours is the best? Are we satisfied that our system results in the selection of those who are best qualified for judicial service? Does our system inspire the confidence of the public towards our judges? Do our citizens feel that our judges are competent, fair and impartial, and motivated only in carrying out their duty of enforcing the law without fear or favor? Does our system meet the test, or is there another one which would better earn public confidence?

The Constitution of the United States still stands as the charter of free men. But what of the Constitution of the State of New York on which the rights of the people of our State are based? You have all read the recent report of the commission headed by the distinguished Vice-President of your Association, Judge Peck, which examined three sample Articles of our Constitution and found that by modernizing these three Articles over 7,000 words, or approximately 18%, of the Constitution could be eliminated. Few of us realize that our Constitution includes a section defining the 17th century Colonial policy towards the sale of Indian lands and the possibility of our State's subservience to the British crown. Long and rambling as it is, it obfuscates the basic rights and principles that the Constitution should make clear and prominent. Here again we have a duty calling for an independent role of our profession.

Other pressing matters include the perennial one of court congestion, and the constant need of revising our laws to meet the needs of our citizens. There are many areas which have hardly been touched. How about juvenile delinquency? Despite the serious social problems which have led to the appalling increase in juvenile delinquency, the public has the right to look to the legal profession for assurance that our laws are properly designed to cope with the problem. That the task is fraught with difficulty is no reason for not tackling it. In this and in many other areas the legal framework required to meet the needs of our changing society must be developed through the initiative of our profession.

Before closing, let me say a word about our opportunity and duty to the world around us. We are going through a period of revolution in the underdeveloped areas of the world. A great mass of submerged people are seeking a new order, free of imperialism, whether that imperialism be political or economic. They wish to avoid totalitarianism, and are learning that Communism is a form of totalitarianism. They seek to establish democracies, and our own Declaration of Independence and our Constitution are often used as their Bible. It was in this context that I was privileged to speak to you last year about the Inter-

national Commission of Jurists, in which American lawyers are playing an important role and which seeks to bring about the acceptance by the lawyers of these countries of a Rule of Law in their respective States. In this endeavor our own traditions of an independent judiciary and an independent legal profession and the right of the accused to a fair trial play a vital part. Mr. Randall has spoken to you of our responsibilities in the field of International Law, and of the initiative which the American Bar Association has taken. Here, too, our success will be measured by our dedication as lawyers to the proposition that trial by law of international disputes is the only practical method in this atomic age.

Inevitably the eyes of the world, and particularly the eyes of the people of the new countries, are focused on us today. They care not for our precepts, but they are deeply interested in our example. They are prepared to accept our concept of a Rule of Law only if we demonstrate that it is a living ideal with us and that, as lawyers, we sustain it above all else that we do. This requires that we remain strong as a profession and, above all, independent, if we are to play the part which our heritage and our opportunities demand.

Delay in the Court

A SUMMARY VIEW

The overall results of this inquiry into court congestion are here systematically presented, without adhering exactly to the sequence of chapters in which they are developed. Since it shows the problems in perspective, it is hoped this chapter will serve the function of an introductory guide as well as that of a final summary.

The function of this chapter is to summarize what we believe we have learned about court congestion. In the chapters that follow, the individual points are developed in detail together with the evidence that supports them. This chapter, then, is meant to be read twice: first as an introduction and again, at the end, as a summary.

The approach

It is tempting to look for the causes of delay and to propose their removal as the solution to delay. Why is there court congestion? Whose fault is it? In the simplest terms, delay is a problem of supply and demand. If there is delay it must be because the demand for judge time has outrun the supply. At first blush, therefore, we would expect a study of delay to tell us that the court's business has increased more rapidly than its judge manpower, or that some factor has intruded which has slowed down the process of disposition which now takes more time than previously, or that judges work less than they used to, and so forth.

This report, however, has a quite different stance. It is, we have

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Editor's Note: Many members will have noted the publication in the early fall of *Delay in the Court* by Hans Zeisel, Harry Kalven, Jr. and Bernard Buchholz. (Little, Brown and Company, Boston, 1959). It deserves a very wide audience because it is the most significant inquiry thus far made as to the nature of court congestion. As former Chief Judge Charles E. Clark has said, "When everyone interested in the administration of justice is worrying as to court congestion, the authors and their university have decided the prime need is for less talk and more knowledge. . ." The book will destroy a number of hoary shibboleths and is refreshingly free from cant. Published here is the first chapter of the book.

come to believe, an error in perspective to look for the causes of delay, especially where as in New York the court has been delayed for over half a century. Delay does not arise dramatically overnight so that it can be traced meaningfully to a set of specific causes. It is rather the result of a slow accretion of pressures, and by the time it has grown sufficiently to be a practical problem it seems no longer profitable to trace historically how it came about. To be sure, anything that might aggravate delay can be said to be a cause of it. It is fashionable to talk, for example, of the concentration of the trial bar as a cause; and, as we shall see, there is something to the point that conflicting trial commitments of busy counsel may produce gaps in the scheduling of trials and a loss of court time. Hence one may be tempted to blame the bar for the delay. But in this sense there are innumerable other causes of delay. Jury trials, as we shall see, do take somewhat longer than bench trials, and the use of impartial medical experts may facilitate settlements. But it is clearly a misuse of language to say that the jury trial and the adversary medical expert system are to blame for delay. One might equally say that the negligence law itself is a cause because it produces difficult and involved issues of liability for trial. In brief, we think the profitable concern is not with the allocation of blame but simply with an evaluation of the relative strength of the various proposals designed to remedy delay.

The emphasis on remedies carries with it one further emphasis. The one certain remedy for delay in any court system is the creation of a sufficient number of additional judgeships and it needs no special study to tell us that. But the question that deserves careful study is what can be done about court congestion apart from asking for additional judges. The creation of new judgeships raises complex political issues and is persuasive only as a last alternative. Only if there are no other avenues left for reducing delay is the case for additional judges compelling, since the maintenance of prompt justice for its citizens is a fundamental cost that society must bear. This study is primarily devoted to a systematic examination of remedies other than the ultimate one of additional judges.

Three basic possibilities

Any discussion of remedies must recognize a basic fact about the pattern of disposition of lawsuits.

To a startling degree the costs that matter are the costs of the cases that reach trial. The point here is that the majority of suits filed are settled voluntarily before trial and that relatively little court time is required for their disposition. To state this quantitatively for the New York Court: some 71 percent of all suits are settled without trial, and the disposition of these cases requires only 16.2 percent of the total court time. The problem of remedies for delay therefore is the problem of affecting that minority of cases that takes up the overwhelming majority of judge time. In the large, there are only three ways of doing this and thereby reducing delay: the time required for the disposition of cases can be shortened; the number of cases requiring official disposition can be reduced by affecting the settlement ratio; or the amount of available judge time can be increased, either by directly adding judges or by increasing somehow the efficiency with which the current judge power is now used.

It is true that if there were some way of reducing the number of controversies that arise between citizens, as for example by reducing the number of auto accidents, this would be a fourth avenue. But this seems to be so wholly beyond the powers of the court to affect that we put it aside.

Two simple but important conclusions follow. First, any effective remedy for delay must operate through one or more of these three basic channels. For example, a change in the rules as to the payment of interest on tort damages must, to affect delay, affect it by having an impact on the settlement ratio; proposals for comparative negligence must operate by affecting the jury waiver ratio, thus increasing the relative frequency of the speedier bench trial; proposals for reducing the concentration of the bar must operate by affecting gaps in trial scheduling, thus making more efficient use of the court's time. Second, unless a court system with a stable or growing delay applies one or more of these three basic remedies, it will continue to have delay.

The organization of the study is thus readily apparent. Part I is devoted to the first basic step, measuring the magnitude of the delay. The next three parts are devoted to the second basic step, evaluating the power of the various remedies: Part II deals with the remedies designed to speed up the trial process; Part III with the remedies designed to affect the settlement ratio; and Part IV with the remedies designed to increase the judge power available. The study concludes in Part V with a look at more general, related matters such as claim consciousness, legal experiments, and forecasting the future workload of a court. Only the first four parts are summarized in this chapter.

If this then is the basic approach and structure of the study, what are its principal conclusions?

The magnitude of delay: How long a wait?

First, as to measuring the magnitude of delay. There are a variety of possible measures—the size of the backlog of pending cases, the age of cases tried in regular order, the average age both of cases tried in regular order and of those given preferment. The size of the backlog, although frequently used in popular discussion, is, we are persuaded, wholly misleading; delay in regular order, although a useful, if rough, predictor for the litigant, fails to show the true efficiency of the court and overstates the magnitude of the delay; thus the average delay of both regular order and preferred cases emerges as the best time index of the magnitude of delay.

If we turn for the moment to the preferred case category, several interesting points come to life. A busy and hard-pressed metropolitan court, suffering delay, is likely to use the preference category for reducing the social costs of delay by giving the most urgent cases a reasonably prompt trial. But the result is to pose a new and difficult policy issue for the court allocating the bonus of a prompt trial. And in New York it is a striking characteristic of the system that not only individual cases but entire types of actions are granted preference. The New York Court has chosen to concentrate all of the delay on the personal injury jury

calendar and to keep its other three trial law calendars up to date. The result is to grant blanket preferment to all commercial cases, whether jury or non-jury, and to all non-jury personal injury cases as well.

The costs of delay in New York are thus borne very differently by different types of litigants. And perhaps most important, the decision to delay only the personal injury jury calendar has resulted in the widespread misconception that the personal injury jury case is somehow the villain. This is, of course, an illusion created by the separate calendar arrangements. Had the Court elected to delay instead only the commercial case calendars or those for red-headed plaintiffs, it would equally appear that it was the commercial case or the red-headed plaintiff, that was the cause of it all.

If we now translate these comments into statistics, it appears that as November, 1956, the main cutoff date for this study,[1] delay in regular order of personal injury jury cases was 39 months, a formidable figure; all other categories of cases were approximately current. Yet some 40 percent of the cases within the personal injury jury calendar were given some preferment and for this group the average waiting period was only 16 months. If the two groups are averaged to reflect the efficiency of the Court, the overall delay on this calendar is 30 months. Finally if we average the delay across all four law trial calendars, the figure drops to about 10 months. Thus, most measures used for delay tend to give a partial view and greatly exaggerate its magnitude. In New York this exaggeration is the difference between the 39 month and the 10 month figure.

The magnitude of delay: How big a job?

We have spoken thus far of the measurement of delay in the time dimension. However, if we are interested in finding out how much of an effort is required to remove delay another measure proves more useful. The time-measure of delay must be translated into a statement of the additional judge effort that would be needed to dispose of the accumulated backlog of cases. This

[1] Many data in this study, however, are as recent as 1958.

poses, as we shall see, an interesting problem in forecasting and admits of a fairly exact estimate. For the New York Court the requirement is 11.7 judge years; this is the cardinal fact of the study and the pivotal figure for the subsequent discussion of remedies. (The "judge year" means the average workload of one judge during one court year.)

This figure immediately places the problem in perspective. Making available 2 more judges to the Court, for example, would eliminate the delay in under 6 years. Since the New York Court uses approximately 17 judges per year for its law trial functions, 2 judges mean an increase of about 12 percent of the Court's judge power in its law division.

What emerges then from a systematic effort to measure the magnitude of delay is the simple but overriding conclusion that in New York—and we would guess in any delayed metropolitan court—delay properly measured reveals itself to be within the reach of practical solution. In this instance measurement has the benevolent consequence of cutting the problem down to size.

While study is indispensable for disclosing the exact additional judge power needed to cure delay, it needs no ghost come from the gave to tell us that delay can be cured by adding more judges. The main burden of this study, we repeat, is within the complex and interesting question: how much can be accomplished by using means other than the addition of judges?

Speeding up the trial process

To what extent can the trial process itself be speeded up? The most obviously and widely discussed possibility is a shift from jury to bench trial. The difference in length between jury and bench trial of the same case turns out to be a surprisingly difficult point to measure because no case, of course, is ever tried both ways. But a reasonable estimate by various procedures is that a bench trial is on the average about 40 percent less time-consuming than a jury trial. If the extreme remedy of total abolition of jury trial in personal injury cases were adopted, the saving in the New York Court would be the equivalent of about 1.6 judges per

year; and the delay would be removed in 5 to 7 years, depending on whether the abolition of jury trial were made retroactive to pending cases.

These figures can be read in two ways, depending upon one's viewpoint as to the values of jury trial itself. They may impress some with the fact that jury trial is expensive in court time and that the abolition of jury trial offers an effective remedy for delay. Or they may be read, as we ourselves would incline to read them, as a price tag for the jury system. On this view, what is impressive is that the addition of only 1.6 judges per year would net the same impact on delay as the abolition of a basic institution. It may be added, though, that this figure, for reasons which will appear later, is particularly small for the New York Court, and will be relatively larger for most others.

In any event, the abolition of personal injury jury trials is a remedy not lightly to be adopted whatever the dimensions of court congestion. Inquiry therefore turns to the possibilities of inducing voluntary shift from jury to bench trial, that is, of increasing the jury waiver ratio. We conclude that in general little can be expected along this line. Under existing law either party can compel a jury trial if he wants one. Whether at least one party elects a jury trial depends to a substantial degree on whether juries are thought to, and in fact do, decide cases the same way judges would. On the best available evidence, it appears that they do not, and that the bar recognizes they do not. And this is particularly true with respect to damage issues in the personal injury field. Ingenious efforts such as the proposal for use of the comparative negligence formula in bench trials may reduce somewhat the anticipated difference between judge and jury trial, but it is most unlikely that by any such means these differences can be fully removed. And until they are, it will continue frequently to be to the advantage of one party to demand a jury trial. Hence, the decisive difficulty with remedies designed to increase the waiver ratio is that the consumer won't buy them.

It is true of course that remedies can be devised which would price the jury trial out of the market, as for example sharply raised fees and costs. But such remedies, since they involve penal-

izing those who wish a jury trial, are really coercive and but a short step away from compulsory abolition. Ironically the one method of increasing waiver that has worked is delay itself. In the New York Court, unlike in most other jurisdictions, the jury waiver ratio in personal injury cases is substantial, approximately 45 percent; and this seems to be largely the result of the deliberate policy of giving trial preferences to non-jury personal injury suits.

It can thus be predicted that if the personal injury jury calendar were brought up to date, there would be a noticeable decrease in jury waiver. To the 11.7 judge years needed to remove the backlog, another 0.6 judge years annually must be added. This represents the time cost by which henceforth the reduction in the waiver ratio would increase the Court's annual workload.

The possibility of speeding up the jury trial itself has received far less attention than its merits. Several lines of evidence point to a considerable potential here. In New Jersey, roughly comparable cases are tried to a jury in approximately 40 percent less time than in New York. The savings come not so much from differences in the obvious jury time costs, such as voir dire and instructions, as from differences in the internal trial process itself. This may in part result from the efficiency of the New Jersey pretrial in narrowing issues for trial, although we have no evidence for this. Perhaps the single most surprising finding of the study is that this difference between jury trial in New York and in New Jersey is as large as the much advertised general difference between bench and jury trial. The inviting conclusion therefore is that the remedy for delay is not to abolish the jury trial but to speed it up.

Increasing the settlement ratio

So much then for the first of the three basic remedies. What about the second? To what extent can the settlement ratio be increased? The behavior underlying the settlement process is complex and warrants substantial further study. But several basic findings emerge from the work done thus far. Small changes in

the settlement ratio would mean substantial changes in the Court's workload. We have seen that only 29 percent of all suits filed reach trial, and that these require over 80 percent of the judge time.

There is first an issue analogous to that noted with respect to waiver as to the effect of delay. Does delay itself increase settlement? Available evidence tends to support the conclusion that delay, unless it is of extreme magnitude, does not affect the settlement ratio. Hence, in New York at least, we need not fear that the reduction of delay will have an offsetting cost and bring an increasing number of trials into court. This does not mean that delay has no effect on settlement. It is self-evident that a delayed court permits the defendant to delay performance. Hence it will tend either to reduce the amount of settlement or to delay its date. Yet the proportion of claims settled eventually before they reach the trial will not necessarily change.

One promising approach to the reduction of trials has been the introduction of the impartial medical expert, a procedure in which New York has in recent years pioneered. The procedure, by narrowing conflicting estimates of the medical facts in personal injury cases, should improve chances for settlement. And what evidence there is thus far lends support to this conclusion. It remains the more puzzling why some New York judges seem to be hesitant in using this trial saving procedure.

Another remedy designed to affect settlement has been the proposal to change the damage rules so as to allow interest in personal injury cases prior to the date of judgment. Here the expectation is that the threat of paying interest will make defendants more willing to settle. There is virtually no empirical evidence on this point at present. But it does permit of theoretical economic analysis. On the basis of such analysis we conclude with considerable confidence that changes in the interest rules will serve simply to change the amount of the settlement, but will not affect its frequency.

Undoubtedly the most widely discussed and widely used method for effecting settlement has been pre-trial. Judges who have

had direct experience with it tend to be convinced that pre-trial is an important agency for bringing about settlement, and they point to the great number of cases that are settled at pre-trial. The exact impact of pre-trial on settlement, however, turns out to be an intricate puzzle that perhaps can be solved satisfactorily only by recourse to an official experiment. In brief, two considerations must be raised in any such evaluation of pre-trial. First, does pre-trial in fact bring about the settlement of cases that would otherwise not be settled? We know that the majority of cases are settled voluntarily before they reach the trial stage, and the apparent settlement effect of pre-trial might simply be a reflection of this basic settlement phenomenon. Various lines of evidence, however, persuade us that pre-trial does have some tendency to increase the settlement ratio.

The second consideration is more stubborn: pre-trial uses judge power that could otherwise be used directly in the trial of cases. The decisive question therefore is whether a judge at pre-trial can settle more cases (beyond those that would have been settled anyway) than he could have tried were he not engaged in pre-trial. If he cannot, it will be more profitable for a delayed court to devote this manpower to trial rather than to pre-trial. On the basis of the evidence available we are not yet prepared to say that pre-trial is effective enough in this respect to overcome the offsetting loss of direct judge trial time. In any event, it is clear that a system can rely too heavily on pre-trial and devote an unprofitable amount of judge power to it in a quest for settlement.

Four other points of interest about pre-trial emerge. First, pre-trial undoubtedly has the socially useful consequence of accelerating the settlement of cases which without it would have been settled later, though still before trial. Second, New York, although committed to the view that pre-trial is effective, uses it only on personal injury jury cases and not on cases on the other three calendars. This is perhaps another instance of the separate calendar arrangement leading to an illusion that only personal injury jury cases need special treatment because only they are de-

layed. Third, the settlement ratios at pre-trial vary greatly for individual judges. This in turn suggests that the format of pre-trial varies greatly not only by jurisdiction, as for example between the formal procedure in New Jersey and the informal procedure in New York and elsewhere, but even within a jurisdiction, depending on the skill and interest and viewpoint of the individual pre-trial judge. And fourth, there is a widespread feeling that the pressures of delay have deflected pre-trial from its original procedural purposes into little more than a bargaining session between opposing counsel and the judge.

Finally a word about the certificate of readiness, a procedure introduced in New York in 1956, following the example of the Federal District Court for the Southern District of New York. The procedure requires that several preliminary steps, including the discussion of settlement, take place before a suit is officially filed. It was hoped that this procedure would produce a "firmer" calendar by accelerating the settlement of cases that would have been settled later, thus eliminating last minute adjournments. There was also some expectation that it might affect the settlement ratio itself. The full story on it is not yet in as we write but some conclusions have begun to emerge.

The certificate's impact on personal injury suits seems to have been a temporary one. After a sharp drop in filings, an equally sharp increase has kept their overall level unchanged. But its impact on the cases on the general calendar has been, it seems, a permanent one. It brought about a reduction in the number of filings and, more important, also in the number of cases that required trial. By this indirect route, then, more trial time became available for the disposition of the personal injury cases at which the certificate originally aimed. In this unexpected way, the certificate proved a successful remedy against delay. Why the certificate should affect contract cases but not personal injury cases is a subject for interesting speculation and possibly further research.

In general, though, the policy of increasing settlements must have its limits. At present, not quite 5 out of every 100 personal

injury claims ever reach the trial stage, and not quite 2 are ever tried to completion. One may well wonder whether, if the proportion of trials be further reduced, cases would be settled and compromised which, in the interest of a living law, ought rather to be tried.

More effective use of judge time

We come to the last of the three generic remedies for delay: more effective use of judge time.

The most interesting and most delicate topic in this general area is whether judges could put in somewhat more time than they now do. It is realized that judges are not ordinary employees and that the problem, if the judiciary is to retain its dignity and independence, is not simply one of time-clock efficiency. From the records kept by the New York Court, however, it has been possible to make certain assessments of how much time is now lost. If we look first at the loss of whole trial days, it appears that the New York Court averaged 170 days out of a possible 196 or a loss ratio of about 13.4 percent. As might be expected, the figures for individual judges vary substantially, suggesting that this time loss arises from factors personal to the judge as well as from scheduling gaps over which the individual judge would have little control.

A similar analysis can be made of the loss of hours per trial day. Here too the data vary by individual judges, indicating again that the loss results both from factors personal to the judge and from outside factors. The average judicial trial day for New York is 4.1 hours, and if all judges could be brought up to this average there would be a net increase of about 7 percent in available judge time.

In many ways the most relevant comparison is to New Jersey, which can be taken as a yardstick of the most that might realistically be expected from more centralized and intensive judicial administration. The loss of trial days in New Jersey is 6.3 percent as contrasted to 13.4 percent for New York; the number of hours per trial day is 4.5 for New Jersey, as compared to the 4.1 figure

for New York. If we combine both factors, it appears that New Jersey gets from its judges about 19 percent more time than does New York, or the equivalent of 3 judges annually in terms of the New York Court. This does indicate that modest help could come from this quarter.

Another important possibility has already been noted. If all trial judges were to concentrate on personal injury jury cases until that calendar was no more delayed than the other three calendars, delay could be leveled across all calendars at a figure of about 10 months. This "remedy" rests on nothing more than sharing judge time evenly for all categories of cases, but it raises a difficult issue of policy as to whether the preference given to commercial cases should be abandoned.

Much has been made of the concentration of the trial bar as a factor. The concentration of the bar is indeed an economic fact. A small minority of firms file a substantial fraction of all personal injury suits and a smaller minority actually handle a substantial fraction of all personal injury cases that go to trial. In the New York Court the busiest 1 percent of the bar makes 6.4 percent of the trial appearances, and some 5 percent of the bar make over 20 percent. But this economic concentration, whatever its significance for other issues, has less impact on court congestion than is popularly supposed. It can only affect delay in so far as it causes gaps in the trial scheduling process and we know from the study of judge time in the New York Court that such gaps cannot exceed a 19 percent loss. Further, although the busiest part of the trial bar is relatively very busy, its trial commitments fall well below the limits of lawyer capacity. Thus even for the top 5 percent, the trial burden in the New York Court is less than 2 cases per month. This does not mean, however, that concentration is not significant for delay. First, the impressions from the New York Court are misleading if taken alone. The same lawyers service several other courts in the New York area, and it appears that the New York County Supreme Court enjoys a preferred position among lawyers in the competition between courts. Second, the concentration is heavy enough at the top to

multiply greatly the chances of conflicting trial commitments and thus seriously aggravate the problems of scheduling. In the end, the preferred solution appears to rest not on a direct attack on bar concentration but on two judicial policies: first, scheduling procedures which explicitly recognize the concentration as a fact and seek in so far as possible to accommodate it, and second, greater firmness in refusing continuances, thus placing back on the law firm the responsibility for being adequately manned.

In the course of the study we treat more briefly such other important possibilities as shifting cases from more busy to less busy courts, a procedure which in New York centers on keeping smaller cases in the courts of limited jurisdiction, and the alternative of shifting judges from less busy areas to more busy areas. These moves are facilitated by a centralized administrative control, but it appears that New York makes poor use of the power it already has. We discuss also the possibilities tried in Massachusetts, Pennsylvania and Oklahoma, of adding judge power by creating temporary substitute judges in the form of auditors, arbitrators or masters. Since these substitute judge schemes involve a direct adding of manpower to the adjudicating function they are effective in reducing delay for the same simple reason the appointment of new judges is. Their appeal lies in the fact that they provide judicial machinery in a more flexible and temporary form and at lower cost. But they raise troublesome issues of basic policy. They smack of second-class justice; they involve self-abdication by the courts, and in any event bargain rate justice is not the objective of the legal system.

Finally, we note that the summer session in 1956 was quite successful. With a burden of two weeks of extra time per individual judge over the summer, the session dispensed the equivalent of 1.5 judge years. The use of comparable summer sessions alone would eliminate delay in about 8 years. As a matter of magnitude, it is as effective a potential remedy for delay as would be the abolition of personal injury jury trials. But it appears that whatever the theoretical potential of this remedy, the customs and traditions of both bar and bench stand seriously in its way.

New Jersey, when faced with an increased case load, increased the judges' daily working hours temporarily rather than resort to a summer session. Reducing the court's summer recess, incidentally, is the only congestion remedy tried in antiquity of which we have a record. But even then, in the year 43 A.D., the Emperor Claudius was unable to perpetuate the measure beyond one year's effort.

This, then, is a brief summary of what this study has to say. The chapters that follow develop these various points in more detail and with appropriate refinements and qualifications. They also present and analyze the available empirical data relevant to them.

It is not within the province of this study to write an agenda for action, but any number of proposals might be built from its specific conclusions. Some proposals prove on analysis to have more promise than others and some prove to have no promise at all. No single remedy appears to dictate a decisive solution, but in combination their potential will cumulate. And since the extent to which each remedy can be expected to help has been estimated, the task of the policy maker should be facilitated.

Although the human behavior which underlies the delay phenomenon is frequently complex, the basic architecture of the problem is seen to be simple. In the end this report makes two major points. First, that there are a severely limited number of ways of doing something about court congestion and delay, and that any solution must reside within this small family of basic remedies. Second, that despite the modest contribution that can be expected from many of the proposed remedies, the problem is well within the reach of practical solution. Neither despair nor recourse to heroic measures is called for.

The City Planning Commission's Proposal for a New Zoning Resolution

A REPORT OF THE COMMITTEE ON REAL PROPERTY LAW

The Committee herewith presents its report on the City Planning Commission's "Proposed Comprehensive Amendment of the Zoning Resolution of the City of New York" (the "Proposed Resolution").

The Committee approves the Proposed Resolution and recommends its adoption.

SUMMARY OF COMMITTEE'S FINDINGS AND RECOMMENDATIONS

The Zoning Resolution adopted by New York City in 1916 was a pioneering achievement. It coupled the regulation of use with the regulation of height and area of buildings, and thus checked the mushroom growth of incompatible uses and prevented the central part of the City from becoming a tangle of dark and airless canyons. This epoch-making enactment provided an example for countless cities throughout the country.

However, since its adoption the Zoning Resolution has not been completely revised, despite the many changes in the face and flow of the City and despite the example, this time provided by other cities, of other zoning ordinances incorporating newly developed zoning conceptions and techniques. Instead these years have witnessed patchwork amendment to the maps and text—more than 2,500 in fact—in an attempt to keep the Resolution reasonably adaptable to the City's zoning needs.

The Proposed Resolution is a complete and comprehensive

Editor's Note: This report and resolutions were approved by the Executive Committee on February 3, 1960.

revision of the Zoning Resolution, and the City is now confronted with the urgent choice between a new fully integrated Resolution and continued piecemeal amendment of the existing Resolution.

The major conclusions of the Committee are these:

1. We find that the present Zoning Resolution is outmoded and does not adequately provide for the needs of the City of New York. Its basic failing is that it lacks a comprehensive concept of rational land use for the City as a whole. As a result it cannot furnish proper zoning guidance for the mature but still dynamic City. We further find that the present Zoning Resolution cannot be adequately modernized by piecemeal amendment.

2. We find that the basic structure of the Proposed Resolution is not subject to the foregoing objections. It incorporates modern zoning conceptions which have been adopted in numerous other cities. By and large it provides a comprehensive, ingenious and flexible instrument to assist in guiding the future growth and development of the City.

3. We also believe that if the Proposed Resolution is not adopted, no other attempt to adopt comprehensive zoning is likely to be made for many years to come. The sustained effort and large expense that resulted in the Proposed Resolution would not be duplicated if the Proposed Resolution is defeated. Accordingly, we believe that it is urgently necessary to support the Proposed Resolution now.

The Committee recommends the approval of the Proposed Resolution.

A more detailed discussion follows.

I–*THE PRESENT ZONING RESOLUTION*

The present Zoning Resolution comprises a zoning text containing provisions regulating the uses of land and the height and area of buildings plus three maps of the City in which property is separately classified by use district, height district and area district.

Deficiencies of Substance

Some of the present Zoning Resolution's deficiencies of substance include the following:

1. Full utilization of the present Resolution would result in a city of about 55 million residents and 250 million workers. A total city pattern so far from the recognizable City of today and of the future is not capable of rationally controlling land development.

2. There is a complete absence of control over uses in "unrestricted" districts and there are far too many such districts designated throughout the City on the zoning maps. On the one hand, this has led to the location of residences in such districts, thus wasting and pre-empting sites that should have been devoted to industry. On the other hand, it has permitted the worst types of noxious uses in many cases in close proximity to homes.

3. The present use districts do not adequately provide for the logical grouping of compatible uses, as is the case with business districts that permit manufacturing and warehousing, and manufacturing districts which are essentially business classifications.

4. Direct control of bulk is provided in only a fraction of the zoning districts; others have indirect controls (i.e., the result of combined height and area district regulations) where the effects tend to be too restrictive and to vary widely because of such accidental factors as district combinations and the size and location of lots.

5. The Resolution is still largely related to lot-by-lot development, a valid image of the City 40 or more years ago but a hindrance to modern large-scale developments in which individual lot lines have little relevance.

6. There is inadequate provision, because of the structure of the text and the maps of the present Resolution, for non-residential parking requirements, a crucial factor for the modern city.

Deficiencies of Form

Because the present Resolution has grown like "Topsy" it is at once over-simplified and over-complicated. The form and or-

ganization of the Resolution as a whole is confused and confusing. Where the text is simply stated there is, in various instances, a sacrifice of content. In some cases, on the other hand, the wording is so complicated as to be virtually incomprehensible. The use of three sets of maps is cumbersome and unnecessary.

The Question of Piecemeal Amendment

If the present Resolution is basically inadequate and outmoded —and there is widespread agreement that it is—the question of revision is essentially one of technique. Should we continue with our attempts to patch up a Resolution for conditions for which it was never intended or should we, as most other cities have done whose zoning ordinances date back to the 1920's, substitute a new and fully-integrated Resolution?

Our own experience is the best answer. Despite the more than 2,500 amendments to text and maps, the present Resolution is still inadequate and obsolete. At this point, it is wholly unrealistic to expect that the process of piecemeal amendment will produce different results in the future than in the past.

Lacking a comprehensive concept of rational land use for the City as a whole, the present Resolution contains a built-in major failing that must defeat all attempts at piecemeal correction. Extensive remapping on the basis of an outworn text can lead only to distortion and unforeseen and inconsistently onerous results. Extensive amendment of the text in accordance with contemporary zoning conceptions without corresponding integration with the map would be pointless.

We think there can be no serious question but that the time has come for a complete revision of the Zoning Resolution and an abandonment of the self-defeating process of patchwork amendment which after more than 40 years has left us still with an outmoded, cumbersome and inadequate instrument to guide the development of the City.

II—*THE PROPOSED RESOLUTION*

Background

The Proposed Resolution is the second serious City-sponsored effort in recent years to formulate comprehensive rezoning. The

first was "The Plan for Rezoning" published in 1951 which had been prepared by outside consultants engaged by the City. The 1951 Plan was approved in principle, with some reservations, by a Special Committee of this Association, whose report was adopted by the Association on January 19, 1954. However, the 1951 Plan was never brought to the action stage by City officials.

In September 1956 the City Planning Commission retained the architectural firm of Voorhees, Walker, Smith & Smith (the "Consultants") to make the appropriate studies and to draft a comprehensive zoning proposal to replace the present ordinance. After more than two years of study the Consultants' proposal was made public in February 1959. The Planning Commission then held a series of informal hearings on the proposal and also consulted various groups having a special interest in zoning, including architects, civic associations, real estate boards and this Committee. (This Committee, at the Planning Commission's request, submitted a written report to the Commission on the proposal.) On December 21, 1959 the Planning Commission presented the Proposed Resolution, which represents the Planning Commission's own revision of the Consultants' proposal. Although the Planning Commission made numerous changes in the Consultants' proposal, the Proposed Resolution retains the essential features of the proposal. The Proposed Resolution will be the subject of public hearings to be held by the Planning Commission during March 1960.

This Committee is pleased to report that many of its suggestions concerning the Consultants' proposal were adopted by the Planning Commission when it formulated the Proposed Resolution. Thus, the Planning Commission adopted the following recommendations of this Committee: (a) deleted all provisions concerning a Zoning Administrator, with rule-making power, to enforce the Zoning Resolution; enforcement will remain with the Department of Buildings and rule-making power with the Board of Standards and Appeals; (b) required findings in all determinations by the Board of Standards and Appeals on applications for variances or special permits; (c) changed the judicial doctrine barring a purchaser with knowledge of the zoning regulations

from applying for a variance in cases of practical difficulties and unnecessary hardship; (d) deleted the Consultants' requirement of publication in a newspaper, in addition to City Record publication, of proposed zoning changes initiated by the Planning Commission; and (e) redrafted various provisions to clarify standards and procedures.

Scope

The Proposed Resolution is based upon a conceivable image of the future City. The New York City which we know today is characterized more by population shifts than by the vast population increases of the past. Its 1957 population of 7,870,000 is expected to grow to 8,340,000 by 1975. The Proposed Resolution would permit building construction to accommodate a population within the City of 11,830,000 and thus allow for changes in trends and future growth.

The Proposed Resolution provides for a single-map system, permitting 62 types of zoning districts for the entire City compared to the three-map system of the present Resolution under which 286 combinations of use, height and area districts are actually mapped and under which more than 1,000 combinations are possible.

The major controls relied upon in the Proposed Resolution relate to use, bulk and intensity of development and parking. Parking is thus made an integral part of the new zoning.

The Proposed Resolution is admittedly neither simple nor brief. It is a document containing over 300,000 words and numerous tables and illustrations. Yet because of the manner in which it has been organized, it is not difficult to use.

Use Regulations

The Proposed Resolution adopts the principle of permissive listing of uses. All uses which are permissible in a district are listed as permitted uses and no others are allowed. This protects the City against the loopholes which develop in prohibitive listing and has the advantage of clarity for persons using the Resolu-

tion. If a use is overlooked or subsequently comes into being as a result of technology, it may be added as a permissive use by amendment in the districts where it is appropriate.

The Proposed Resolution provides for 13 use districts: 2 Residential, 8 Commercial and 3 Manufacturing.

The Manufacturing districts also embody the modern principle of "performance standards" which involve the establishment of measurable standards in 8 aspects of potential industrial nuisances, such as noise, odors, vibration, etc. Different levels of performance are established for each of the 3 Manufacturing districts. The purpose of this technique is to prevent the development of nuisances where they may be harmful to their neighbors and to the community and also to permit industries, which can comply with the stated standards in each type of district, an opportunity to locate there. Thus an industry classified as belonging in Manufacturing 2 or Manufacturing 3 districts can locate in Manufacturing 1 if it qualifies under all the higher district standards.

Apart from the use districts and the performance standards, the uses permissible in each of the 13 different use districts are stated in terms of 18 "use groups." The uses listed in each of these groups have either common characteristics or common functional relationships. This permits a desirable flexibility as to the purposes and characteristics of each district, which is unattainable under the present Resolution.

A relatively small number of uses are given special treatment. These are uses such as bus stations, race tracks, children's amusement parks, etc. which require the granting of a special permit, after the making of specified findings, by either the Board of Standards and Appeals or the City Planning Commission before such uses can be located in specified districts. Each of these uses has certain characteristics which makes such special consideration desirable—those involving significant planning issues being assigned to the Planning Commission and the rest to the Board of Standards and Appeals.

A notable feature in connection with the power of the Board of Standards and Appeals to grant variances and special permits

is the absence of a counterpart to Section 7(e) of the present Resolution, which permits the Board to grant variances for a stated term of years for "buildings and uses not in conformity with the requirements of this article." This blanket authority is eliminated and the Proposed Resolution specifically enumerates the uses which the Board may permit in various districts subject to the making of findings. We approve of the elimination of the blank check type of authority to grant all types of variances on the ground that it would lead to the dilution of the Resolution.

The Proposed Resolution also provides that in Residence districts certain present non-conforming uses must terminate at the end of specified periods, and further restricts the restoration of non-conforming uses after damage or destruction to a certain prescribed extent. The validity of these provisions is discussed later in this report.

Bulk Controls

The Proposed Resolution provides for direct control of bulk and density instead of the present Resolution's indirect controls arrived at by a combination of height and area regulations. The bulk controls are designed to regulate (a) the over-all bulk or density allowable on a particular zoning lot, and (b) the disposition of this bulk within the confines of the zoning lot.

The control of over-all density of development applies to all districts without exception. This is the floor area ratio which is already in use in several, but not all, of the area districts of the present Resolution. If this were the only over-all density control in Residence Districts there might be an unwarranted increased density as a result of building small dwelling units in order to get as many units as possible within the specified floor area. The Proposed Resolution, therefore, provides additional regulations for Residence Districts specifying a certain lot area for each room, varying with the number of rooms in the apartment. The purpose of this direct control of population density is to make possible intelligent planning for schools and other community facilities.

A novel concept in this regard is the use of bonuses to encourage the builder to leave open space on his lot at the street level. For every unit of ground space left open, several additional units of floor space beyond the normal maximum may be added.

Flexibility within the limits of adequate provision for light and air is also intended in the provisions for controls over the shape of buildings and their location on the lot. These provisions are intended to permit a wider choice in the disposition of the allowable building bulk than presently exist.

The hope is that the bulk controls will properly control population density and at the same time permit flexibility of design and contribute to economical construction.

Parking

The Proposed Resolution recognizes that the automobile has added a new dimension to city life and that provision for parking must be considered as an essential element of the modern zoning resolution. Since 1950 the present Resolution has had fairly effective requirements for off-street parking for residential buildings. However, all efforts to introduce parking requirements for non-residential buildings have failed, largely because parking requirements were not contemplated initially and the present Resolution does not lend itself to amendment for this purpose.

The Proposed Resolution, generally speaking, requires all buildings in all districts to provide the needed amount of off-street parking, except for Manhattan south of 110th Street and downtown Brooklyn. The Proposed Resolution increases in some instances the required parking for Residential Districts over that provided in the present Resolution, and introduces parking requirements for commercial and industrial areas.

III—*LEGAL QUESTIONS*

A. NON-CONFORMING USES

1. *Termination*

The treatment of non-conforming uses is one of the most difficult problems in zoning. Such non-conformity is generally rec-

ognized as one of the chief causes of blight, congestion and slums. However, the efforts to eliminate non-conforming uses inevitably collide with powerful pressures to preserve existing investments.

The early hope was that the non-conforming use would simply disappear over the course of time because its incompatibility with its neighboring uses and structures would make its continuance economically unprofitable. In fact, the non-conforming use rarely disappears by voluntary abandonment and indeed provisions similar to Section 6 of the present Resolution, which protects non-conforming uses, have, in many instances, unintentionally granted monopoly rights by excluding competitors from the area.

To mitigate the effects of non-conforming uses, many recent zoning ordinances have provided for the elimination of the worst types of such uses after prescribed periods which would permit the amortization of the owner's investment. The Proposed Resolution includes provisions of this "amortization" type designed to deal only with the most damaging cases, i.e., manufacturing and related uses in Residence Districts.

The attitude of the New York Court of Appeals which is discernible from *Harbison* v. *City of Buffalo,* 4 N.Y. 2d 553 (1958), *People* v. *Miller,* 304 N.Y. 105 (1952), and *Town of Somers* v. *Camarco,* 308 N.Y. 537 (1955), is on the whole favorable to such amortization, but the cases before it to date have not furnished the real test. One can state with confidence only that non-conforming uses are constitutionally protected unless the loss to the owner resulting from termination is relatively slight and insubstantial. In *People* v. *Miller, supra,* the Court upheld the termination of a pigeon farm. In *Somers* v. *Camarco, supra,* it held unconstitutional the proposed cessation of a sand and gravel business (involving "substantial" improvements) on one year's notice. In the *Harbison* case, *supra,* it held valid a Buffalo ordinance which required termination of a junkyard use in a residential district within three years, and remanded the case for evidence whether application of the ordinance was reasonable in the facts at bar; the lower court subsequently found that moving its junk-

yard would cost the petitioners about $20,000 and that accordingly the ordinance was *not* reasonable as applied there (unreported decision, discussed in 44 Cornell Law Quarterly (1959) 450, 451).

The proponents of amortization of non-conforming uses have been encouraged by the Court of Appeals' opinion in the *Harbison* case not so much for the holding as for the Court's tolerant discussion and its citation, with evident approval, of liberal decisions in other states.

Thus the Court in the *Harbison* case stated as follows (4 N.Y. 2d at 561, 562):

"Leaving aside eminent domain and nuisance, we have often stated in our decisions that the owner of land devoted to a prior nonconforming use, or on which a prior nonconforming structure exists (or has been substantially commenced), has the right to continue such use, but we have never held that this right may continue virtually in perpetuity. Now that we are for the first time squarely faced with the problem as to whether or not this right may be terminated after a reasonable period, during which the owner may have a fair opportunity to amortize his investment and to make future plans, we conclude that it may be, in accordance with the overwhelming weight of authority found in the courts of our sister States, as well as with the textwriters and commentators who have expressed themselves upon the subject. * * * In ascertaining the reasonable period during which an owner of property must be allowed to continue a nonconforming use, a balance must be found between social harm and private injury. We cannot say that a legislative body may not in any case, after consideration of the factors involved, conclude that the termination of a use after a period of time sufficient to allow a property owner an opportunity to amortize his investment and make other plans is a valid method of solving the problem."

The Proposed Resolution would terminate the following non-conforming uses in Residential Districts only, after the expiration of the following time periods:

1. Open uses involving no substantial structures (i.e., structures with a floor area of less than 400 square feet or having an assessed valuation of less than $2,000) would terminate in 3 years (Section 52–82). This is similar to the regulation upheld by the Court of Appeals in the *Harbison* case.

2. Certain non-conforming uses deemed especially objectionable in Residence Districts, such as coal storage, dumps, auto

wrecking establishments, not located within a completely enclosed building or which involve the use of buildings or other structures having an assessed valuation of less than $20,000 would terminate in 10 years (Section 52–84). This is similar to (1) and is also supported by the "nuisance" doctrine. The longer time period appears to be reasonably related to the somewhat larger investment.

3. Certain non-conforming uses, generally manufacturing or heavy service establishments, located in buildings designed for residential use, would terminate in 10 years (Section 52–85). The lack of substantial investment in plant facilities may in some cases bring this situation, on analysis, close to the conditions in (1) and (2). It would seem that the rationale in the *Harbison* case would be persuasive, if not controlling under such circumstances.

4. Certain non-conforming uses, generally manufacturing or heavy service establishments, located in buildings not designed for residential use would terminate either 25 years after the effective date of the new Resolution or 40 years after the date of issuance of the original Certificate of Occupancy, whichever is later (Section 52–86). If such non-conforming uses are located in a non-residential building which has been enlarged, or is located in two or more buildings, the time periods are based on the date of extension or the building with the longer useful life (Sections 52–861 and 52–862). Upon application, the termination date may be extended by the Board of Standards and Appeals for one term of 3 years (Section 73–33).

The above plan for amortization of non-conforming uses appears to the Committee to be reasonable in most situations, and in our opinion would be valid under New York law as it is presently evolving. We would suggest, however, that the Planning Commission consider the comments made by a Special Committee of this Association on a similar proposal, to the effect that an owner should have an administrative remedy whereby he may be granted an appropriate extension of time in cases where the prescribed period is unreasonable or inadequate. (As previously noted, the Special Committee's Report was adopted by the Asso-

ciation in January, 1954). The Planning Commission might conclude that in lieu of Section 73–33, *supra*, which would provide a discretionary three-year grace period, the proposed Resolution should empower the City Planning Commission—not the Board of Standards and Appeals—to act on individual applications for special permits extending the period of amortization, upon a showing of unnecessary hardship and practical difficulties, balanced against the public interest in terminating non-conforming uses.

2. *Restriction on Reconstruction*

Section 25 of the present Resolution provides that:

"Nothing in this resolution shall prevent the restoration of a building wholly or partly destroyed by fire, explosion, act of God or act of the public enemy or prevent the continuance of the use of such building or part thereof as such use existed at the time of such destruction of such building or part thereof."

The Proposed Resolution represents a departure from the above-quoted provision of the present Resolution. Where a building which is substantially occupied by a non-conforming use is damaged or destroyed "by any means" to the extent of 50% or more of its total floor area, the building may be repaired or incidentally altered, i.e., altered in its non-structural aspects, and the non-conforming use continued, but the building may not be "reconstructed" except for a conforming use (Section 52–621). If "floor area" is an inappropriate measure of the extent of damage or destruction, an application may be made to the Board of Standards and Appeals which may substitute "reconstruction costs" for floor area (Section 52–622).

These provisions are similar to the provisions now not uncommon in modern zoning ordinances which terminate the right to replace a non-conforming use or building if more than a certain per cent of value is destroyed by fire or similar catastrophe. McQuillin, Municipal Corporations (3d ed.) Vol. 8, sec. 25.195; *Palazzola* v. *City of Gulfport*, 211 Miss. 737, 52 So. 2d 611 (1951), upholding a 50% clause.

The New York courts have had occasion to uphold an ordi-

nance providing that a non-conforming building damaged by fire to the extent of more than 75% of its value shall not be repaired except for a conforming use, *Matter of Koeber* v. *Bedell*, 254 App. Div. 584, 3 N.Y.S. 2d 108 (2d Dept. 1938), *aff'd without opinion*, 280 N.Y. 692 (1939); but the validity of a provision restricting restoration where the damage is less than 75% does not appear to have been litigated in this jurisdiction.

In the opinion of the Committee the proposed 50% provision is reasonable and valid.

3. *Lapse*

Under the present Resolution discontinuance of a non-conforming use terminates the use. But discontinuance is interpreted as abandonment, and as a practical matter the owner may resume the non-conforming use if he shows that he did not intend to abandon it.

The Proposed Resolution substitutes an objective test: the right to a non-conforming use is lost if the use is discontinued for 2 years (except where directly caused by war, strike or a public improvement) and "Intent to resume active operations shall not affect the foregoing." (Section 52–71).

The social desirability of terminating non-conforming uses appears to have been a factor in the decision in *Franmor Realty Corp.* v. *Le Boeuf*, 201 Misc. 220, 104 N.Y.S. 2d 247 (Sup. Ct. Nassau 1951), *aff'd* 279 App. Div. 795 (2d Dept. 1952), upholding an ordinance prohibiting resumption of a non-conforming use after a discontinuance of one year. The Court was satisfied that the period of one year was reasonable and, despite proof that the owner did not intend to abandon, refused to permit resumption of the non-conforming use. This decision supports the validity of the provision in the Proposed Resolution making irrelevant intent to resume.

B. PERFORMANCE STANDARDS

One of the most significant features of the Proposed Resolution is the requirement that all uses and structures in Manufacturing Districts comply with specified performance standards. These

standards relate to noise, vibration, smoke and dust, odorous matter, toxic or noxious matter, radiation hazards, fire and explosive hazards, humidity, heat or glare (Sections 42–21 through 42–28). The standards would vary between M1 (light manufacturing), M2 (medium manufacturing) and M3 (heavy manufacturing) districts. Within 15 years all non-conforming uses in Commercial or M1 districts would have to conform to the performance standards applicable to an M1 district and non-conforming uses in an M2 or M3 district would have to conform to the performance standards for the applicable district (Section 52–51).

In principle and as a legal matter the proposed performance standards would appear to be as unexceptionable as performance standards in a building code. If definitely expressed so that administrative discretion is not unchecked, both are an exercise of the police power and rest for their legal validity on a factual demonstration of reasonableness. The standards proposed represent in the first instance the analysis of the Consultants which was thoroughly reviewed and in a number of cases modified by the Commission.

Although many counties and municipalities are presently employing performance standards in their zoning ordinances no court decisions specifically addressed to their validity seem to have appeared to date; *cf.*, however, *Newark Milk and Cream Co. v. Township of Parsippany-Troy Hills*, 47 N.J. Super. 306, 135 Atl. 2d 682 (1957), sustaining the constitutionality of a zoning ordinance containing performance standards.

C. THE ISSUANCE OF SPECIAL PERMITS BY THE CITY PLANNING COMMISSION

In the Committee's opinion no substantial question of law is raised by the provisions in the Proposed Resolution which give the City Planning Commission power, subject to the approval of the Board of Estimate, to grant special permits for certain specified uses in zoning districts where such uses would not otherwise be permitted. The special permit uses include

amusement establishments such as arenas, drive-in theatres, race-tracks and children's amusement parks, off-street parking establishments, public utility or transportation facilities, including bus stations and airports. Under the present Resolution some of these uses would require a variance from the Board of Standards and Appeals while others, such as large public garages, drive-in theatres, bus stations and airports, already come within the jurisdiction of the Planning Commission. The Proposed Resolution carries forward the recognition that the special permit uses are not exceptions to a general zoning plan but are an integral part of it and that the power to determine whether and where they should be located properly belongs to the Planning Commission.

In the case of each special permit use, the Commission is required to make specified findings and under Sections 74–30 *et seq.* detailed standards applicable to the respective uses are expressed. In the opinion of the Committee the standards set forth in these sections are adequate to guide the Planning Commission and therefore raise no legal problem.

The Committee is untroubled by the not altogether accurate contention that this portion of the Proposed Resolution takes the Planning Commission into a type of zoning activity that it has not thus far carried out. The point has been made that the Planning Commission would be transformed from a solely legislative agency in the field of zoning into an agency that is sometimes legislative, as in the field of amendment, and sometimes administrative, as in the case of special use permits.

In view of the standards set forth in Sections 74–30 *et seq.*, we do not regard the labeling of the Planning Commission's function as significant. If it is performing a legislative function, the City Planning Commission has all of the freedom of action which the courts have recognized for zoning purposes ever since the *Ambler Realty* case, 272 U.S. 365 (1926); see also, *Nappi* v. *LaGuardia,* 184 Misc. 775, 55 N.Y. Supp. 2d 80 (Sup. Ct. 1944). If the function is administrative, the standards are quite adequate for the guidance of the City Planning Commission.

Furthermore, there is ample opportunity for judicial review

of the actions of the City Planning Commission in granting special permits irrespective of whether such actions are legislative or administrative. If legislative, the actions are reviewable by means of a proceeding for a declaratory judgment alleging unconstitutionality of the zoning legislation itself. If administrative, review can be had by means of a proceeding under Article 78 of the Civil Practice Act.

D. EFFECTIVE DATE—VALIDITY OF PERMITS

The effective date of the Proposed Resolution is one year after the date of its approval by the Board of Estimate or July 1, 1961, whichever is later (Section 11–70). This is in effect a grace period which has been provided to ease the transition to the new Resolution.

The Proposed Resolution provides that if a building permit has been issued prior to the effective date of the new Resolution, construction may proceed under the provisions of the existing Resolution. The Proposed Resolution also seeks to negate possible administrative delays in reviewing plans by protecting a building permit approved after the effective date of the Resolution if complete plans and detailed specifications were filed not later than 60 days before the effective date (Section 11–321).

The owner will have two years from the effective date of the Resolution to complete the building in accordance with the building permit but if the two-year period is insufficient, the owner may apply to the Board of Standards and Appeals for not more than a one-year extension, which the Board is empowered to grant if it finds that at the time of the application substantial construction above the foundations had been completed and substantial expenditures had been made in connection with the superstructure, and a two-year extension, including permission to start new buildings, is permitted in the case of developments involving more than one building (Section 11–322).

The plan outlined above represents a substantial modification of the original proposal made by the Consultants and is also considerably more liberal than Section 22-B of the present Resolu-

tion. Section 22-B authorizes work to proceed, after a change of zoning, only if the zoning change becomes effective "after operations have been lawfully started on erecting a structure." The cases construing provisions similar to Section 22-B hold that unless the owner has undertaken some actual construction, such as the building of foundations, he is bound by the provisions of the new zoning regulations even though he has done extensive work in clearing the site, taken borings, made architectural drawings and plans, and spent large sums of money predicated on the new construction being within the scope of the old zoning provisions. *Atlantic Refining Company, Inc.* v. *Zoning Board of Appeals of the Village of Sloan,* 14 Misc. 2d 1022, 180 N.Y. Supp. 2d 656 (Sup. Ct. 1958); *Fox Lane Corporation* v. *Mann,* 216 App. Div. 813, 215 N.Y.S. 334 (2d Dep't 1926) *aff'd* 234 N.Y. 550, 154 N.E. 600 (1926); *Atlas* v. *Dick,* 275 App. Div. 671, 86 N.Y.S. 2d 238 (2d Dep't 1949) *aff'd* 290 N.Y. 654, 87 N.E. 2d 55; *Rosenzweig* v. *Crinnion,* 126 N.Y.S. 2d 692 (Sup. Ct. 1953).

The numerous objections to the Consultants' proposal in regard to effective date and pre-existing permits and the awareness of the narrow construction of Section 22-B has undoubtedly led the Commission to propose the procedures and time periods outlined above. Although the Proposed Resolution considerably liberalizes Section 22-B by exempting the owner from having to build foundations before the zoning change becomes effective, and thus in effect grants a "vested right" on the basis of filed plans alone, it is nonetheless clear that the Planning Commission's time schedule may create hardship particularly in the case of large projects required to be built in separate units where numerous tenants may have to be relocated. In such instances the two-year period for the completion of construction, plus the extension obtainable from the Board of Standards and Appeals, may be insufficient to permit the developer to go forward with the contemplated project. In most cases, however, the chances are that the moratorium before the effective date together with the time periods granted by the Proposed Resolution will be suffi-

cient to allow the orderly transition of the real estate market from the old to the new Zoning Resolution.

The Planning Commission, however, might consider having the two-year period within which to complete construction begin to run not from the effective date of the Resolution but from the date of the issuance of the building permit. This would perhaps make for a more uniform time period, i.e., the period would actually be the same in all cases, and no owner would be penalized merely because his plans took longer to process through the City departments.

In any event, however, no legal question appears to be presented by these provisions of the Proposed Resolution. If an owner has a "vested", i.e., a constitutional right to complete nonconforming or non-complying construction only if actual building has been undertaken prior to the zoning change, he cannot, upon being excused from this requirement, validly complain on the ground that the time period for the completion of construction is inadequate in his particular case.

E. OTHER QUESTIONS

None of the other legal and constitutional questions considered by the Committee appears to present any substantial question of law requiring comment in this report.

IV—*CONCLUSION AND RECOMMENDATION*

The Committee submits the following resolution, intended to express the views set forth in the foregoing report:

> BE IT RESOLVED, that in the opinion of this Association, the present Zoning Resolution of the City of New York is inadequate and should be replaced; and be it further
>
> RESOLVED, that the Proposed Comprehensive Amendment of the Zoning Resolution of the City of New York (the "Proposed Resolution"), prepared by the City Plan-

ning Commission, is a proper and suitable replacement; and be it further

RESOLVED, that this Association endorses the Proposed Resolution, and recommends its adoption.

Respectfully submitted,

COMMITTEE ON REAL PROPERTY LAW

MENDES HERSHMAN, *Chairman*

JOSEPH CALDERON	HENRY W. KLEIN
HERMAN COHEN	JAMES S. LANIGAN
JOHN S. DORF	WARNER H. MENDEL
PAUL H. FOLWELL	EUGENE J. MORRIS
C. THOMAS GODFREY	GEORGE W. PALMER
LOUIS GREENBLATT	HENRY V. POOR
*RAYMOND J. HOROWITZ	LAWRENCE S. PRATT
HARRY JANIN	CARL D. SCHLITT
HERMAN JERVIS	SHIRLEY A. SIEGEL
FREEBORN G. JEWETT, JR.	MAXWELL H. TRETTER

F. ROBERT WHEELER, JR.

Dated: New York, January 12, 1960.

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* Mr. Horowitz is Chairman of the Real Property Committee's Zoning Subcommittee.

Committee Report

COMMITTEE ON PROFESSIONAL ETHICS

OPINION NO. 843

Question: Under the new Federal Labor Law which gives a member the right to sue the union or the officers for an accounting and to recover any moneys illegally taken or expended, can an attorney retained by the union on a permanent basis advise, or represent the union, or the officers involved in any matter where a member, availing himself of his legal right under the new law, brings an action under the law to obtain an accounting and possibly a suit to recover under the bond for the union?

Opinion: As we understand it, the new Federal Labor Law (Labor-Management Reporting and Disclosure Act of 1959, P.L. 86–257, 73 Stat. 519) confers upon a member of a union the right to maintain an action against the officers or representatives of a labor organization for violation of their fiduciary obligations, provided (1) the labor organization or its governing board or officers refuse to maintain the suit, and (2) leave of court has been obtained upon a showing of good cause to maintain the suit. In this connection, the statute specifies that the recovery of damages or other appropriate relief is "for the benefit of the labor organization."

In our view, the rights thus conferred upon a union member are, in many respects, analogous to the right of a stockholder of a corporation to maintain a so-called "derivative" action.

Your inquiry raises questions under Canons 6 and 37. The Canons contain two basic interdictions: first, attorneys must not represent two or more clients whose interests are conflicting; second, attorneys must not compromise confidences of clients and former clients.

Some unions are incorporated and thus are artificial persons or legal entities having an existence independent of the union membership. The more usual type of union is the union which is not incorporated but, rather, a voluntary, unincorporated membership association, i.e., "not an artificial person." (Cf. *Martin* v. *Curran*, 303 N.Y. 276.)

In either case, we believe the ethical considerations are the same. In the circumstances, we are of the opinion that the views expressed in Opinion No. 842 with respect to the propriety of one firm representing the corporation and the director-officer defendants in a stockholders' derivative action have equal application to the propriety of one law firm representing the union and the officer or representative defendants in union member actions brought under the new Federal Labor Law referred to.

February 1, 1960

OPINION NO. 844

Question:

1. May an individual conduct the practice of law and accounting from one office?
2. May an individual have business cards printed which indicate that he is both an attorney and a CPA?
3. May an individual serve as counsel to a client for whom he performs accounting services?
4. May an attorney who is employed by a firm of CPA's indicate on his firm card that he is an attorney? May he display in his private office evidence of admission to the bar?
5. May a firm of attorneys permit an employee to indicate on his firm card that he is a CPA? May the firm permit such employee to display his CPA certificate?

Opinion: Our answers to your questions will be keyed to the numbers designated in your inquiry.

1. An individual may conduct the practice of law and accounting from one office provided that he, in the practice of his profession as certified public accountant, adheres to the professional standards applicable to attorneys at law with respect to advertising and solicitation. Opinion 743 of this Committee, issued jointly with Opinion 388 of the New York County Lawyers' Association.

2. An individual may not have business cards printed which indicate that he is both an attorney and a CPA. Reference on an attorney's letterhead or business card that he is a certified public accountant constitutes an advertisement of qualifications for the practice of a separate and distinct profession and is disapproved by this Committee. Opinion 788 of this Committee.

3. This question is covered by our answer to question 1 above. A lawyer may render both accounting and legal services under the conditions described above, and the fact that both are rendered to the same client is of no material significance.

4. An attorney employed by a firm of CPA's may not indicate on his firm card that he is an attorney. Opinion 788 of this Committee. He may, however, display evidence of admission to the bar in his private office.

5. A firm of attorneys may not permit an employee to indicate on his firm card that he is a CPA. Opinion 788 of this Committee. A firm may permit such employee to display his CPA certificate in his private office.

February 1, 1960

The Library

LAW OF CHANCE

Applications of the federal gambling stamp tax law. 1959. 8 De Paul L. Rev. 362.

American Bar Association. Comm. on Organized Crime. Report and research studies. Ed., Morris Ploscowe; introd., Estes Kefauver; address, Robt. P. Patterson. New York, Grosby Press. 1952–3. 2v.

Report. New York. 1951. 65p.

Bachelder, W. K. Suppression of bookie gambling by a denial of telephone and telegraph facilities. 1949. 40 J. Crim. L. 176–85.

Burt, F. T. P. Bets under the betting control act. 1955. 3 U. of West. Aust. Ann. L. Rev. 334.

California. Legislature. Assembly. Interim Com. on Revenue & Taxation. Taxation of horse racing in Calif. Rep., pursuant to H. Res. no. 141, June 10, 1953. Sacramento. 1954. 115p.

California. Legislature. Assembly. Interim Com. on Governmental Efficiency & Economy. Horse racing in Calif.; report. Sacramento. 1955. 172p.

California. Legislature. Senate. Interim Com. on Horse Racing. Report. Sacramento. 1955. 11p.

Chafee, Zechariah, Jr. State house vs. Pent House; legal problems of the Rhode Island race track row. Providence, The Booke Shop. 1937. 165p. (Dorr pamphlet no. 1)

Chance and skill as elements of gambling in Louisiana. 1955. 30 Tul. L. Rev. 129.

Coons, J. E. Federal gambling tax and the constitution. 1953. 43 J. Crim. L. 635–42.

Crowley, W. F. New weapon against confidence games. 1959. 50 J. Crim. L. 233.

Cunkle, Arthur Lee. Racing taxes in Florida. Tallahassee, Citizens Tax Council. 1957. 22p.

Delaware. Bingo Comm. Report and proposed legislation. Dover, Executive Dept. 1956. 13p.

Edwards, Frederic. Brief treatise on the law of gaming, horseracing and wagers. London, Butterworth. 1839. 141p.

Federal regulation of gambling. 1951. 60 Yale L.J. 1396–1416.

Gaines, Robert P. Criminal law: Florida's legal lotteries. 1956. 9 U. of Fla. L. Rev. 93–5.

Gambling. 1950. 269 ANNALS. American Acad. of Pol. Sci.

Blanche, Ernest E. Lotteries yesterday, today and tomorrow. 71–6. Gambling odds are gimmicked. 77–80.

Day, John I. Horse racing and the pari-mutuel. 55–61.

Deland, Paul S. The facilitation of gambling. 21–9.

Jacoby, Oswald. The forms of gambling. 39–45.

Lawrence, Louis A. Bookmaking. 46–54.

Legalized gambling in New York? 35–8.

Lopez-Rey, Manuel. Gambling in Latin American countries. 134–43.
McDonald, Joseph F. Gambling in Nevada. 30–4.
Peterson, Virgil W. Obstacles to enforcement of gambling laws. 9–20.
Ploscowe, Morris. The law of gambling. 1–8.

Gambling today via the "free replay" pinball machine. 1958. 42 Marq. L. Rev. 98.

Great Britain. Royal Comm. on Lotteries & Betting.
Selection from statements and summary of gambling legislation in other countries. London, HMSO. 1933. 573p.
Minutes of evidence. London, HMSO. 1932–3. (24 pam. in IV.)
Final report. London, HMSO. 1933. 183p.
Minutes of evidence. London, HMSO. 1950. 549p.
Report to parliament. London, HMSO. 1951. 189p.

Hagan, C. B. Wire communications; utilities and bookmaking. 1951. 35 Minn. L. Rev. 262–82.

Hand, Robert J. Pinball machines which award free games as gambling devices. 1957. 11 Wyo. L.J. 163–8.

Landman, J. H. Government's hypocrisy in gambling. 1956. 34 Taxes. 107–8.

Laws, lotteries and business promotion. 1959. 8 Kans. L. Rev. 110.

Lewis, Oscar. Sagebrush casinos; the story of legal gambling in Nevada. Garden City, Doubleday. 1953. 256p.

Lieck, Albert Henry, ed. Betting and lotteries. London, Butterworth. 1935. 172p.

Ludwig, F. J. and Hughes, D. Bingo, morality and the criminal law. 1955. 1 Catholic Law. 8–26.

McKetney, Edwin Charles. Let's legalize off-track gambling. New York, Pageant Press. 1954. 16p.

Maine. Attorney General's Office. Report covering investigation and prosecution of gambling in Cumberland, York, Androscoggin and Penobscot counties. Augusta. 1952.

Manes, H. R. Gambling and the law. 1951. 42 J. Crim. L. 205–22.

Marx, Herbert L., ed. Gambling in America. New York, Wilson. 1952. 222p.

Massachusetts. Spec. Comm. to Investigate Organized Crime & Gambling. Report, rev. and cont'd. under chap. 147, resolves of 1955. 402p.

Massachusetts. Legislature. Research Bureau. Proposed legalization of beano. State House, Boston. 1957. 11p.

Medd, Patrick. Gambling and gaming. 1959. 103 Sol. J. 825–6.

New Jersey. Law Enforcement Council. 8th report: law enforcement and organized gambling. Trenton. 1956. 29p.

New Jersey. Legalized Games of Chance Control Comm. Report on P.L. 1954, Chap. 6 and P.L. 1954, Chap. 5. Trenton. 1955. 8p.
Rules, regulations and forms; bingo & raffles licensing laws; constitutional amendment. Newark. 1958. 142p.

New Jersey. Legislature. Senate. Spec. com. to investigate administration of the bingo and raffles licensing laws. Pub. hearing. Trenton. 1958. 92p.

New Mexico. Laws and rules governing horse racing. State Racing Comm. 1954. 96p.

New York State. Laws relating to racing corporations and pari-mutuel revenue. Albany. 1951. 43p.

New York State. Dept. of Law. Report of Saratoga county investigation to Jacob K. Javits, att'y. gen., by Arthur H. Christy, spec. ass't. Albany. 1955. 32p.

New York State. Moreland Comm. Proceedings pursuant to governor's executive order, Oct. 10, 1953. New York county court house, Oct. 28, 1953–Mar. 12, 1954. New York. 1954. 7v.

O'Brien, John F. Regulation of horse racing in Ohio. Columbus, Ohio Legislative Svce. Comm. 1959. 28p.

People of Puerto Rico. Dept. of Finance. Bureau of the administration of the lottery. Laws and general regulations. San Juan, Bureau of Print. 1938. 21p.

Peterson, Virgil W. Gambling—should it be legalized? Springfield, Ill., Thomas. 1951. 158p.

Racing wire service. 1953. 5 Stan. L. Ref. 493–502.

Raju, Vadrevu Bhadir. Gambling acts of India. Ahmedebad, C. C. Vora. 1949. 133p.

Recovery of gambling losses. 1952. 5 U. of Fla. L. Rev. 185–93.

Regulation of gambling devices in interstate commerce. 1955. 4 De Paul L. Rev. 256–66.

Richmond County. New York. Grand Jury. Report to attorney general; final presentment. New York. 1954. 37p.

Schmitt, G. R. Wagering contracts in Saskatchewan. 1955. 20 Sask. B. Rev. 38–47.

Statutory trends between legalization of gambling. 1949. 34 Iowa L. Rev. 647–58.

Two approaches to the problem of preventing use of interstate communications facilities to aid illegal gambling interests. 1951. 40 Geo. L.J. 68–90.

U.S. Congress. (81.2) House. Com. on Interstate & Foreign Commerce. Gambling devices. Hearings on S. 3357 and H.R. 6736. Washington, Govt. Print. Off. 1950. 308p.

U.S. Congress. (83.2) House. Com. on the Judiciary. Prohibiting certain acts and transactions involving gambling materials. Hearings on H.R. 7975. Washington, Govt. Print. Off. 1954. 33p.

U.S. Congress. (69.1) House Com. on Post Office & Post Roads. Excluding lottery and other gambling devices from the mails. Hearings on H.R. 6982, Feb. 18, 1926. Washington, Govt. Print. Off. 1926. 13p.

U.S. Congress. (82.1) Senate. Com. on Armed Services. Illegal gambling activities near Kessler air force base. Hearings, Oct. 22, 1951. Washington, Govt. Print. Off. 1952. 152p.

U.S. Congress. Senate. Com. on Interstate & Foreign Commerce.

(81.2) Transmission of gambling information. Hearings on S. 3358. Govt. Print. Off. 1950. 962p; report to accompany S. 3358. 1950. 32p.

(82.1) Anticrime legislation. Hearings on S. 1563, S. 1564, S. 1624 and S. 2116. Govt. Print. Off. 1951. 164p.

(82.1) Licensing the transmission of certain gambling information in interstate and foreign communications. Report to accompany S. 1563. Govt. Print. Off. 1951. 14p.

(82.1) Prohibiting the importation, transportation and mailing of gambling materials, broadcasting of gambling information, etc. Govt. Print. Off. 1951. 8p.

(82.1) Transmission of gambling information. Report to accompany S. 2116. Govt. Print. Off. 1951. 38p.

(83.2) Antigambling legislation. Hearings on S. 3190, a bill to amend sec. 3 of the act of Jan. 2, 1951 and S. 3542, a bill to prohibit transmission of gambling information. Govt. Print. Off. 1954. 43p.

U.S. Congress. (72.1) Senate. Com. on Post Offices & Post Roads. Penalties for use of mails in connection with fraudulent devices and lottery paraphenalia. Hearings on S. 182, a bill to amend sec. 213, act of Mar. 4, 1909 (criminal code). Govt. Print. Off. 1932. 40p.

U.S. Library of Congress. Div. of Bibliography. Lotteries in the U.S. and other countries with emphasis on their use as means of raising governmental revenue; a list of recent references. Washington. 1942. 16p.

U.S. Office of Internal Revenue. Regulation 132 relating to excise and special tax on wagering under chap. 27A of internal revenue code. Washington, Govt. Print. Off. 1951. 44p.

Washington. State. Legislature. Senate. Com. to investigate the licensing of clubs to sell liquor by the drink and to operate slot machines. Report. Olympia. 1948. 143p.

Williams, Francis Emmett. Flexible-participation lotteries. St. Louis, Thomas Law Book. 1938. 413p.

Williams, Francis Emmett. Lotteries, laws and morals. New York, Vantage Press. 1958. 388p.